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Supreme Court, U.S.
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In The

Supreme Court of the United States

ELIZABETH R. ROACH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Sentencing Guidelines violate the Fifth and/or Sixth Amendments to the United States Constitution in all cases?

2. Should a party be foreclosed from presenting supplemental evidence to a district court after a court appeals remands a case for resentencing?

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioner, Elizabeth Roach, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which was entered in the above-entitled case on June 24, 2004.

OPINIONS BELOW

The Seventh Circuit's opinion affirming the petitioner's sentence is published at 372 F.3d 907 and attached in Appendix ("App.") A. The district court's judgment order is attached in App. B. The district court's opinion granting the government's motion for reconsideration and denying the petitioner's renewed motion for downward departure is attached in App. C. The Seventh Circuit's original opinion vacating the sentence and remanding the case for resentencing is published at 296 F.3d 565 and attached in App. D.

JURISDICTION

On June 24, 2004, the United States Court of Appeals for the Seventh Circuit delivered its opinion affirming Petitioner Elizabeth Roach's sentence. App. A. No petition for rehearing was filed. This petition has been filed within 90 days of the Seventh Circuit's judgment and is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury.

3. Title 18, United States Code, § 3553(a) provides:

> (a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

4. Title 18, United States Code, § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence.

STATEMENT OF THE CASE

1. Petitioner was charged with scheming to defraud her employer of more than $240,000 in violation of 18 U.S.C. § 1343. "The scheme involved padding her expenses, submitting false expense reports, requesting reimbursement for conferences that she registered for but did not attend, resubmitting expense reports that were already paid, and falsely labeling personal expenses as business expenses." *United States v. Roach*, 372 F.3d 907, 908 (7th Cir. 2004) ("*Roach II*"); App. A-2. Petitioner repaid credit card debts, accrued from excessive purchases of jewelry and clothes, with the embezzled funds. *Id.*

Petitioner pled guilty. Her adjusted offense level under the United States Sentencing Guidelines was Level 13, Criminal History Category I, thereby resulting in a 12-18 month Zone D imprisonment range. Petitioner moved for downward departure pursuant to U.S.S.G. § 5K2.13 (significantly reduced mental capacity at the time of the offense). At the time of the initial sentencing, the Seventh Circuit had not determined whether § 5K2.13 required the mental impairment to be the behavior constituting the offense.

The United States District Court, the Honorable Matthew F. Kennelly, granted a downward departure in accordance with *United States v. Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000), which held that § 5K2.13 does not require a "direct link" between the defendant's impairment and the crime. Judge Kennelly sentenced the petitioner to five years probation, six weeks work release, six weeks home confinement with weekend electronic monitoring and barred her from obtaining any credit cards absent court permission. *Roach II*, 372 F.3d at 908; App. A-3.

2. The government appealed. It was uncontroverted that the petitioner suffered "from chronic depression and for most of her adult life has turned to unnecessary and excessive shopping to relieve the pain of that depression." *United States v. Roach*, 296 F.3d 565, 566 (7th Cir. 2002) (*Roach I*); App. D-2. The government did not seriously dispute that the petitioner "had a significantly impaired ability to control her shopping, or that either her depression or compulsive shopping disorder motivated her crime." *Id.* at 568-69; App. D-7. The government, however, argued that, under § 5K2.13, impairment that provided the motive is an insufficient 'connection' to the offense. *Id.* at 569; App. D-7. "In the government's view, for volitional impairments, the compulsive behavior must be the behavior constituting the offense, and not some other behavior that explains the motive." *Id.*

The Seventh Circuit concluded that "section 5K2.13 requires an assessment of the defendant's mental capacity at the time of the offense." *Roach I,* 296 F.3d at 571; App. D-11-12. The Seventh Circuit deemed it "not entirely clear" whether the district court had found that the petitioner's impairment related to an inability to control her conduct when she committed the offenses. *Id.*; App. D-12. The Seventh Circuit assumed that the district court's findings included such a finding and examined the evidence. *Id.* In doing so, the Seventh Circuit noted that some of the expert submissions did not discuss the petitioner's mental capacity at the time of the offenses. *Id.* at 571-73; App. D-13. While other experts had concluded that the petitioner "had a significantly reduced mental capacity" during the offenses, the Seventh Circuit ruled that they did not offer sufficient "explanation of reasoning." *Id.* at 572; App. D-14. The Seventh Circuit held that a finding that the petitioner had

a significantly impaired mental capacity to control her conduct at the time of the offense to be unsupported by the evidence. *Id.* at 571; App. D-12.

In its conclusion, the Seventh Circuit stated:

> We have no doubt that Roach's depression and shopping have had a profound impact on her life. In this way she is like countless criminal defendants who come before the court from all walks of life with a wide variety of personal characteristics that suggest a basis for leniency. *The sentencing guidelines, however, significantly limit a district court's ability to fashion a sentence based on such considerations.* Those guidelines prescribe a particular sentencing range, which in this case was driven by the magnitude of Roach's fraud. We are mindful that our review of the district court's decision to impose a sentence below this range is deferential, but are convinced that the court abused its discretion in granting a downward departure based on § 5K2.13. Its findings on Roach's motive do not establish the critical issue of her mental capacity at the time of the offense, and on that issue, there is no evidence to support the court's conclusion that Roach had a significantly impaired ability to control her behavior. Roach's sentence is therefore VACATED and the case REMANDED for resentencing.

Id. at 573 (emphasis added); App. D-16.

3. On remand, the petitioner sought leave to renew her motion for downward departure and supplement the record with further medical opinions addressing the "critical issue of her mental capacity at the time of the offense." *United States v. Roach*, No. 00 CR 41, District Court Record ("R.") 38 (N.D. Ill.). The government opposed

the motion, contending that revisiting "the downward departure issue would violate the principle of 'law of the case,' and undermine any concept of finality in the sentencing process." R. 39. Petitioner responded that the Seventh Circuit's order did not limit the district court ability to reconsider the "critical issue" and that she appeared before the district court for resentencing with a "clean slate." R. 40. The district court found the cases cited by the petitioner persuasive, and allowed the petitioner to renew her motion for downward departure. R. 41.

The government requested reconsideration on grounds that cases cited by the petitioner were no longer good law. R. 45, pp. 2-5. According to the government, certain cases had "disavowed the notion that a general remand gives the district court a 'clean slate' in the resentencing process." R. 45, pp. 3-4. Petitioner opposed the reconsideration request and the district court initially disagreed with the government's position. *See United States v. Roach*, 03 WL 21183997 (N.D. Ill. 2003); App. C.

On April 25, 2003, the government again sought reconsideration based upon the discussion of *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), in *United States v. Sumner*, 325 F.3d 884 (7th Cir. 2003). R. 52. This time, Judge Kennelly sided with the government, stating:

> The Court of Appeals, though first indicating that it was unclear whether this Court had made a sufficient finding on the issue of Roach's condition at the time of her offense, went on to say that if we had made such a finding, it was unsupported by the evidence. The latter holding is sufficient to bring the *Wyss* rule into play. Roach

> is not entitled on remand to attempt to plug the gap that the Court of Appeals found in the original record. Her motion for downward departure is therefore denied.

Roach, 03 WL 21183997; App. C-9. Judge Kennelly nevertheless indicated that the matter was not free from doubt, and that the Seventh Circuit's position conflicted with other circuits. *Id.*

4. On June 6, 2003, Judge Kennelly sentenced the petitioner to one-year and one-day in prison, followed by two years supervised release. R. 59; App. B. At the sentencing hearing, Judge Kennelly said:

> The sentence that I have – the sentencing range that I'm dealing with now is 12 to 18 months in prison. *The low end of that is in my opinion far in excess of what is warranted in this case based on its unusual circumstances. But that sometimes happens with the Sentencing Guidelines* and that sometimes happens in cases involving people whose circumstances are at the completely opposite end of the spectrum of Ms. Roach. It is certainly true in this case. But what the Sentencing Guidelines do is they essentially confine our discretion both ways. They put a cap on it, they put a floor on it, except in unusual situations, and this I guess is not one of those, at least as the Court of Appeals has seen it.

6/6/03 Tr. 24 (emphasis added).

5. Petitioner appealed. In its opinion, the Seventh Circuit stated that the principle that allows a district court to restructure its sentence after a remand does not allow the district court to reopen "fully heard issues." *Roach*, 372 F.3d at 910; App. A-4. The court of appeals

looked to cases that had prohibited the government from submitting new evidence in support of a sentencing guideline point on remand. *Id.* at 909; App. A-4. The court observed that it had not previously applied the remand limitation to defendants. *Id.* at 910; App. A-5. The court nonetheless affirmed, stating, "When either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor." *Id.*

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS SENTENCED UNDER AN UNCONSTITUTIONAL SENTENCING SCHEME IN WHICH THE DISTRICT COURT WAS OBLIGATED TO TREAT THE UNITED STATES SENTENCING GUIDELINES AS MANDATORY; PETITIONER, WHOSE CASE IS ON DIRECT APPEAL, WOULD RECEIVE A LESSER SENTENCE IF THE SENTENCING GUIDELINES ARE ADVISORY IN ALL CASES

On June 24, 2004, this Honorable Court handed down *Blakely v. Washington*, 124 S.Ct. 2531 (2004). As now familiar, the majority opinion in *Blakely* stated:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring, supra,* at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v.*

> *United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority.

124 S.Ct. at 2537.

Blakely addressed the State of Washington's sentencing guidelines, and did not consider the United States Sentencing Guidelines. In *Blakely's* aftermath, the courts of appeal have divided on the question of whether *Blakely* applies to the federal sentencing guidelines.[1] Notably, in

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[1] As recently stated in *United States v. Hammoud*, 2004 WL 2005622, *20 (4th Cir., September 8, 2004):

> The Seventh and Ninth Circuits have ruled that *Blakely* does impact the guidelines. See *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir.2004); *United States v. Booker*, 375 F.3d 508, 511 (7th Cir.2004) ("*Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge."), cert. granted, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104). In contrast, the Fifth and Sixth Circuits have held that *Blakely* does not affect the guidelines. *See United States v. Koch*, 2004 WL 1870438, at *1 (6th Cir. Aug. 13, 2004) (*en banc*) (order affirming judgment of the district court) ("We hold . . . that the decision of the U.S. Supreme Court in *Blakely* . . . does not invalidate the appellant's sentence under the federal Sentencing Guidelines."); *United States v. Pineiro*, 377 F.3d 464, 465-66 (5th Cir.2004) ("Having considered the *Blakely* decision,

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United States v. Booker, 375 F.3d 508 (7th Cir. 2004), the Seventh Circuit determined that *Blakely* applied to federal sentencing guideline enhancements.

The law is clear that this Honorable Court's declarations of constitutional law apply to all cases then pending on direct appeal. *See Schriro v. Summerlin*, 124 S.Ct. 2519, 2522 (2004); *Yates v. Aiken*, 484 U.S. 211, 215-16 (1988); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Because the time for the filing of a certiorari petition had not expired when this Honorable Court rendered its decision in *Blakely*, the petitioner is entitled to application of the constitutional rule announced in *Blakely*. *See Griffith*, 479 U.S. at 321 n. 6 (judgment becomes final when "the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

This Honorable Court has granted the Solicitor General's petitions for certiorari in *Booker* and *United States v. Fan Fan*. Nos. 04-104 and 04-105. In its merits brief in those cases, the government acknowledges that the Sixth Amendment may be violated "by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." *United*

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prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines. . . .."). The Second Circuit certified questions regarding the application of *Blakely* to the guidelines to the Supreme Court, see *United States v. Penaranda*, 375 F.3d 238, 247 (2d Cir.2004), but in the meantime has declined to apply *Blakely* to the guidelines, see *United States v. Mincey*, 2004 WL 1794717, at *3 (2d Cir. Aug. 12, 2004) (*per curiam*).

States v. Booker, No. 04-104, U.S. Brief, p. I. Assuming this Honorable Court so finds, the government has framed a secondary issue as follows:

> [W]hether, in a case in which the Guidelines would require the court to find a sentencing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

Id.

Before this Honorable Court in *Booker*, the government opposes severance of the "unconstitutional" portions of the guidelines, *i.e.*, sentencing enhancements requiring a jury determination based on a proof beyond a reasonable doubt standard. While asking (as an alternative argument) this Honorable Court to find the guidelines unconstitutional in their entirety, the government apparently envisions a regime in which sentencing guidelines would sometimes apply, *e.g.*, in cases in which a disputed sentencing enhancement is determined by a jury or admitted by the defendant.

A sentencing system that is constitutional in some cases, but not others, would be rather odd. If either party conjured a disputed guideline point – whether real or not – the guidelines would be not mandatory. That system would leave the application of Congressional Acts to the whims of the parties. It also would lead to sentencing disparity – parties could create or avoid disputes depending on their prediction of whether their sentencing position would be more likely vindicated by the discretion of a particular district judge or the sentencing guidelines.

It is the petitioner's position that the United States Sentencing Guidelines are unconstitutional in their entirety, and in *all* cases. *See United States v. King*, 2004 WL 1769148 (M.D. Fla., July 19, 2004); *United States v. Mueffleman*, 327 F.Supp.2d 79 (D. Mass. 2004). Federal sentences in all cases – including ones in which the jury finds, or the defendant admits, the aggravating factor – should be imposed in accordance with 18 U.S.C. § 3553(a), with the guidelines remaining "advisory factors for the court to consider." *Booker*, U.S. Brief, p. 67.

Petitioner was sentenced under an unconstitutional system. As the government suggests in *Booker*, advisory guidelines do not violate the United States Constitution. Here, however, the guidelines were anything but advisory. As the Seventh Circuit recognized in *Roach I*, the petitioner, like many criminal defendants, had presented mitigating facts, but they could not be used to reduce the sentencing range. *Roach I*, 296 F.3d at 573; App. D-___. Moreover, in resentencing the petitioner to the penitentiary, the district court emphatically stated that it would impose a lesser sentence but for the guidelines. 6/6/03 Tr. 24. The petitioner consequently has been prejudiced. She would not be facing a penitentiary sentence in the face of non-mandatory sentencing guidelines.

Based on the foregoing, Petitioner Elizabeth Roach respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment and remand for reconsideration in light of *Blakely* and/or *Booker*.

II. THE CIRCUITS HAVE SPLIT OVER THE ISSUE OF WHETHER A PARTY MAY PRESENT NEW EVIDENCE IN THE DISTRICT COURT AFTER A COURT OF APPEALS REMANDS A CASE FOR RESENTENCING

Scope of remand questions is an area of the law that is "fraught with confusion." *United States v. Roach*, 03 WL 21183997, *4 n. 1 (N.D. Ill. 2003) (citing *United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2000)); App. C-8. Seventh Circuit jurisprudence illustrates as much. As Judge Kennelly noted below, several Seventh Circuit decisions "indicated that after a sentence is vacated, a 'clean slate' exists" on remand. *Roach*, 03 WL 21183997, *1 (citing *United States v. Polland*, 56 F.3d 776 (7th Cir. 1995); *United States v. Atkinson*, 979 F.2d 1219 (7th Cir. 1979); *United States v. Barnes*, 948 F.2d 325 (7th Cir. 1991)); App. C-2.[2] In *United States v. Sumner*, 325 F.3d 884 (7th Cir. 2003), the court held that the government could introduce new evidence on sentencing remand occasioned by plain error appellate review. The government construed *Sumner,* and its discussion of *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), as establishing a general ban on the introduction of new evidence on remand where the appellate court reversed the district court's original finding (on plenary review) on insufficiency of the evidence grounds. *Wyss*, however, did not reference *Polland* which "was decided just three years earlier (in 1995), and was seemingly reaffirmed in *Parker* in 1996." *Roach*, 03 WL 21183997; App. C-7.

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[2] In accordance with those decisions, Judge Kennelly on two occasions ruled that the petitioner could pursue her downward departure motion on remand.

Although the district court viewed the issue as "close," it deduced that *Wyss* had "effectively overruled *Polland*." *Roach*, 03 WL 21183997; App. C-8. Judge Kennelly thus denied the petitioner's request to reopen the downward departure motion (to address the deficiency identified by the court of appeals). Judge Kennelly noted that his interpretation of *Wyss* conflicted "with the law in several other Circuits." *Id.* *4 (citing *United States v. Rodgers*, 278 F.3d 599, 602 (6th Cir.2002); *United States v. Behler*, 100 F.3d 632, 635 (8th Cir.1996)); App. C-9.

Roach II, too, observed that the law was not uniform. The Seventh Circuit cited *United States v. Matthews*, 278 F.3d 880, 889 (9th Cir.2002) (*en banc*), as conflicting with its decision.[3] In *Matthews*, the defendant sold three firearms to

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[3] In addition to *Matthews*, cases involved in circuit split may be cataloged as follows: *Compare Rodgers*, 278 F.3d at 602 ("When a district judge sentences a defendant after remand, the judge is permitted to revisit the entire sentencing procedure, unless she is restricted in her review by the remand order. (Citation omitted.) When the remand order does not restrict the district court in its reassessment of its sentence, the court remains free to rely upon 'any legitimate factors' when making its determination, as long as it rules without vindictiveness."); *Behler*, 100 F.3d at 635 ("Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any evidence on that issue that it could have heard at the first hearing."); *United States v. Moreno-Hernandez*, 48 F.3d 1112, 1116 (9th Cir. 1995) ("A resentencing mandate from an appellate court, however, does away with the entire initial sentence, and authorizes the district court to impose 'any sentence which could lawfully have been imposed originally.' "); *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (when a criminal sentence is vacated, it becomes void in its entirety; the sentence – including any enhancements – has been wholly nullified and the slate wiped clean. Consequently, . . . the district court is free to reconstruct the sentence utilizing any of the sentence components."); *with United States v. Noble*, 367 F.3d 681, 682 (7th Cir. 2004) ("the government is not permitted on remand to try again and submit new evidence in a

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an ATF informant. He was subsequently convicted of being a felon in possession of a firearm and sentenced as an Armed Career Criminal ("ACC") to 280 months in prison. *Matthews*, 278 F.3d at 882. On appeal, Matthews challenged, among other things, the application of the ACC enhancement. *Id.* at 883. A three-judge panel affirmed Matthews' conviction, reversed his sentence because the District Court erred in sentencing Matthews as an ACC and remanded for resentencing on the existing record. *Id.* at 882. The Ninth Circuit agreed to hear the case *en banc* to determine whether, in remanding for resentencing, it was appropriate to limit the district court's discretion to consider additional evidence. *Id.* at 882. Matthews argued that the Ninth Circuit ought to limit the district court's discretion to consider evidence beyond the existing record because the Government failed to meet its burden of production and persuasion and "ought not be allowed a 'second bite at the apple.'" *Id.* at 885. The *en banc* panel rejected Matthews' contention and held:

> We are not persuaded that we should impose such limitations on the district court's discretion to consider any matter, including additional evidence, relating to resentencing.
>
> We hold that, as a general matter, if a district court errs in sentencing, we will remand for resentencing on an open record – that is, without limitation on the evidence that the district court may consider.

Matthews, 278 F.3d at 885.

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belated effort to carry its burden."); *United States v. Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (the government should not get a "second bite at the apple" after remand).

We are unaware of any decisions in which this Honorable Court has specifically addressed scope of remand issues in the sentencing context. In *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243 (1957), this Honorable Court stated, "It is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." If that is the "undeniable rule" in the trial-remand context, then it is difficult to fathom why sentencing remand should be treated differently.

The notion that a party is wholly foreclosed from supplementing the record on remand is also inconsistent with 18 U.S.C. § 3661, which provides, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence." A court order barring the petitioner from renewing her motion for downward departure with supplemental evidence upon remand violates § 3661 in that it constitutes a "limitation . . . on information concerning the background, character, and conduct of a person . . ."[4]

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[4] When the Seventh Circuit originally remanded this case in July 2002, the statute governing sentencing appeals, 18 U.S.C. § 3742, did not include specific instructions for the court of appeals, or the district court upon remand. The PROTECT Act, Pub.L. 108-21, which became effective April 30, 2003, amended § 3742 to include such instructions. Among other things, the PROTECT Act precludes a district court on remand from imposing a sentence outside the guideline range unless specifically discussed in the district court's statement of reasons for the sentence prior to the appeal and identified by the court of appeals as a

(Continued on following page)

In addition, due process considerations weigh in favor of allowing the petitioner to supplement the record on remand. At the original sentencing hearing in this case, the parties obviously did not have benefit of the Seventh Circuit's application of § 5K2.13 (since that would come as a result of the government's later appeal). As detailed above, the Seventh Circuit announced a certain construction of U.S.S.G. § 5K2.13 in *Roach I*. Under that circumstance, simple fairness dictates that the petitioner be afforded an opportunity to satisfy the standard articulated by the court on appeal. *See United States v. Stern*, 13 F.3d 489, 498 (1st Cir. 1994) ("where a sentence is vacated and remanded for redetermination under correct principles, [a party] is not automatically foreclosed from offering evidence pertinent to the newly announced rule"); *see also Coleman v. McCormack*, 874 F.2d 1280, 1288 (9th Cir. 1989) (*en banc*) (due process violation occurred when "reformulated" sentencing statute was applied to defendant without advance notice.).

Congress has granted the government and defendants significant appellate rights in the sentencing context. 18 U.S.C. § 3742(a), (b). We could not even begin to list the number of cases that have been remanded for resentencing since the United States Sentencing Guidelines went into effect. Suffice it to say, appellate sentencing remand is not rare. As shown by this case, confusion exists as to what can and cannot be litigated on sentencing remand, and the

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permissible ground of departure. 18 U.S.C. § 3742(g)(2) (2004). Although the PROTECT Act became law after the remand in *Roach I*, the present version of 18 U.S.C. § 3742(g)(2) is inconsistent with 18 U.S.C. § 3661.

courts of appeal have not ruled in a uniform fashion. Clarification by this Honorable Court is needed.

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner Elizabeth Roach respectfully moves this Honorable Court to enter an order granting certiorari, vacating the Seventh Circuit judgment, reversing the Seventh Circuit's judgment, remanding for further proceedings and granting any other appropriate relief.

Respectfully submitted,

MARC W. MARTIN
Counsel of Record
JEFFREY B. STEINBACK
53 W. Jackson Boulevard,
Suite 1420
Chicago, Illinois 60604
(312) 408-1111

APPENDIX A

372 F.3d 907

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Elizabeth R. ROACH, Defendant-Appellant.

No. 03-3078.

Submitted Jan. 9, 2004.*

Decided June 24, 2004.

Barry Rand Elden (submitted), Chief of Appeals, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Jeffrey B. Steinback, Chicago, IL, for Defendant-Appellant.

Before POSNER, EVANS, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

In this successive appeal we consider for the second time the propriety of Elizabeth R. Roach's sentence for her conviction for wire fraud. Roach contends that our remand order vacating the district court's sentence permitted the court to consider additional evidence regarding the vacated downward departure for diminished capacity. Therefore, she reasons, the district court

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* We have concluded, after an examination of the briefs and the record, that oral argument is unnecessary. The appeal is, therefore, submitted on the briefs and the record. *See* Fed. R.App. P. 34(a)(2).

erred at the resentencing hearing when it did not allow expert testimony regarding her state of mind at the time she committed the charged offense. We disagree. For the reasons stated below, we affirm.

I. BACKGROUND

We assume familiarity with the general facts of this case as set forth in *United States v. Roach,* 296 F.3d 565 (7th Cir.2002) (*Roach I*). We will repeat only those facts pertinent to this appeal. Roach pled guilty to wire fraud in violation of 18 U.S.C. § 1343, for knowingly executing a scheme to defraud her employer of more than $240,000. The scheme involved padding her expenses, submitting false expense reports, requesting reimbursement for conferences that she registered for but did not attend, resubmitting expense reports that were already paid, and falsely labeling personal expenses as business expenses. She used the embezzled funds to repay credit card debts that she accrued from excessive purchases of jewelry and clothes.

In *Roach I,* the district court concluded, and we agreed, that Roach suffers 573.

B. The Resentencing

The district court, over the government's objections, granted Roach's motion for leave to file a renewed motion for downward departure. Roach intended to use expert witnesses to prove that her mental capacity was significantly impaired at the time she committed the offense. Prior to the admission of any evidence, the government filed a motion to reconsider based on supplemental authority, in light of *United States v. Sumner,* 325 F.3d 884 (7th

Cir.2003). In granting the government's motion, Judge Kennelly opined that under *Sumner:*

> if a sentencing factor or departure motion is fully litigated in the district court, and the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling, then the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances justifying such an opportunity.

Mem. Op. & Order at 7. After granting the government's motion, the district court sentenced Roach, without the downward departure, to 12 months and one day of imprisonment. Roach appeals, arguing that the district court should have allowed her to supplement the record with additional evidence regarding her mental capacity.

II. DISCUSSION

Roach's contention that the district court erred in not fully revisiting the issue of her mental capacity at the time she committed her offense is a question of law that we review de novo. *United States v. Husband,* 312 F.3d 247, 251 (7th Cir.2002).

Roach's insistence that our remand order subjected her resentencing to a "clean slate," and, therefore, a rehearing on her request for a downward departure, is incorrect. The "clean slate" analogy, like the parallel "unbundling of the sentencing package" analogy, refers to a district court's ability to restructure sentences after part or all of the sentence is severed or vacated. *See United States v. Polland,* 56 F.3d 776, 778-79 (7th Cir.1995) (vacating a sentence results in a "clean slate" for the

district court to resentence); *United States v. Noble,* 299 F.3d 907, 910 (7th Cir.2002) (*Noble II*) ("[I]t is settled that after the appellate court vacates the sentence on a particular count, the district court on remand may adjust the entire sentencing 'package.'"). These concepts allow a district court to effectuate its original sentencing intent, *see United States v. Binford,* 108 F.3d 723, 728-29 (7th Cir.1997), but they do not permit the district court to reopen fully heard issues anew. We articulated this limit in *United States v. Wyss,* 147 F.3d 631 (7th Cir.1998), where we precluded the government from presenting additional evidence on an enhancement during the resentencing hearing, stating: "The government was entitled to only one opportunity to present evidence on the issue." *Id.* at 633; *see also United States v. Noble,* 367 F.3d 681, 682 (7th Cir.2004) (*Noble III*) (holding that "the government is not permitted on remand to try again and submit new evidence in a belated effort to carry its burden."); *United States v. Leonzo,* 50 F.3d 1086, 1088 (D.C.Cir.1995) (holding that the government should not get a "second bite at the apple" after remand, as the government bore the burdens of production and persuasion). *But see United States v. Matthews,* 278 F.3d 880, 889 (9th Cir.2002) (en banc) (holding that a district court can generally consider additional evidence for remanded sentencing guidelines issues). We clarified in *Sumner,* 325 F.3d at 888, however, that this limit is not absolute, as there is a "difference between an issue that was fully explored at the initial sentencing hearing and one that received no attention, but was nonetheless reviewed on appeal under the plain error standard." In the latter case it may be appropriate to admit additional evidence, whereas if an issue has been fully explored, the party bearing the burden of proof

should be precluded from presenting additional evidence. *See id.* at 889.

Here, the district court rightly declined to allow Roach to supplement the record at her resentencing, as Roach's mental capacity was fully explored at her initial sentencing hearing. In fact, the record demonstrates both that the government objected to the application of the downward departure and that Roach presented evidence in support of her contention that she was significantly impaired at the time she committed the offense. Indeed, Roach submitted three doctors' statements, her binge shopping history, and the activities surrounding those binges in her attempt to persuade the court that she qualified for the downward departure. In *Wyss* and *Noble III,* we held that the government fully explored the sentencing enhancement issue after submitting testimony to prove drug quantity. *Wyss,* 147 F.3d at 633 (presenting defendant's testimony); *Noble III,* 367 F.3d 681, 682 (presenting government witness's testimony). And, just as in those cases, we find that Roach was not entitled to a second bite at the apple on remand.

Although this is our first application of the *Wyss* rule to defendants, Roach, correctly, does not argue that the rule should apply to the government but not to defendants. Just as the government has the burden when seeking a sentence enhancement, *United States v. Sienkowski,* 359 F.3d 463, 466 (7th Cir.2004), Roach had the burden of establishing that she was entitled to a downward departure. *See United States v. Chavez-Chavez,* 213 F.3d 420, 422 (7th Cir.2000) (noting that the defendant bears the burden when seeking a downward departure). When either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the

opportunity of a remand to supplement the record in its favor.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

Elizabeth Roach

Date of Original Judgment: May 18, 2001
(Or Date of Last Amended Judgment)
Reasons for Amendment:

[xx] Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

[ ] Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

[ ] Correction of Sentence by Sentencing Court (Fed. R. Crim. P.

[ ] Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
00 CR 411
Defendant's Attorney

[ ] Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

[ ] Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

[ ] Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

[ ] Direct Motion to District Court Pursuant to [ ] 28 U.S.C. § 2255 or [ ] 18 U.S.C. § 3559(c)(7)

[ ] Modification of Restitution Order (18 U.S.C. § 3664)

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] pleaded nolo contendere to count(s) one of the information which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1343	Wire Fraud	4/1/1999	One

The defendant is sentenced as provided in pages 2 through _____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. Other than the amendments or modifications stated in this judgment, the judgment entered _____ is to stand (see attachment).

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United

States attorney of any material change in the defendant's economic circumstances.

June 6, 2003
Date of Imposition of Judgment

/s/ Matthew Kennelly
Signature of Judicial Officer

U.S. District Judge
Name & Title of Judicial Officer

(MRU) August 4, 2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of *12 months and one day.

[X] The court makes the following recommendations to the Bureau of Prisons:

*That defendant be designated to the FPC Pekin

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m. [ ] p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO (Rev. 3/01) amended Judgment in a Criminal Case Sheet 2A-Imprisonment

(Note: Identify Changes with Asterisks (*))

ADDITIONAL IMPRISONMENT TERMS

*Execution of sentence is stayed pending appeal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Two years

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

*Defendant is prohibited from obtaining any credit cards or entering into any new credit relationship without Court permission.

*Defendant is to maintain mental health treatment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 100	$*10,000	$ 241,061.08

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	***Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
*Restitution has been paid in full			
Totals:	$ _____	$ _____	

[ ] If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA

V.

Elizabeth R. Roach

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 00 CR 411

Jeffery Steinback
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) One of information

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1343	Wire Fraud	4/1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within

30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

May 18, 2001
Date of Imposition of Judgment

Signature of Judicial Officer

U.S. District Court Judge
Matthew F. Kennelly
Name and Title of Judicial Officer

June 4, 2001
Date

PROBATION

The defendant is hereby placed on a probation for a term of Five (five) years.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm, as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL PROBATION TERMS

Defendant is to serve 6 weeks of work release at Salvation Army Center in Chicago, Illinois; three weeks to be served consecutively within the next 120 days; three weeks to served consecutively before 5/31/02. Defendant will be eligible for the Level System.

It is further ordered that defendant is to be on home confinement with electronic monitoring on Saturdays and Sundays for six months, except during any period in which defendant is in the Salvation Army Center.

It is further ordered that defendant is prohibited from obtaining any credit cards or entering into any new credit relationship without Court permission. Defendant is to maintain mental health treatment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	$ 100.00	$ 30,000	$ 241,061.08

[ ] If applicable, restitution amount ordered pursuant to plea agreement $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $ _____

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived.

[ ] the interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Restitution has been in paid in full			
Totals:	$ _____	$ _____	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X In full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

C [ ] not later than _____; or

D [ ] in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E X in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant has paid the restitution amount in full.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

APPENDIX C

2003 WL 21183997 (N.D.Ill.)

United States District Court,
N.D. Illinois, Eastern Division.

UNITED STATES OF AMERICA

v.

Elizabeth ROACH

No. 00 CR 411.

May 20, 2003.

MEMORANDUM OPINION AND ORDER

KENNELLY, J.

Defendant Elizabeth Roach pled guilty to a charge of wire fraud. In June 2001, the Court granted Roach's motion for a downward departure based on U.S.S.G. § 5K2.13, based on her significantly reduced mental capacity at the time of the offense. In July 2002, the Court of Appeals reversed; its order vacated the sentence and remanded for resentencing. *United States v. Roach,* 296 F.3d 565 (7th Cir.2002). The court stated that § 5K2.13 "requires an assessment of the defendant's mental capacity at the time of the offense," and it ruled that "in making this assessment ... the district court's analysis and finding fall short." *Id.* at 571. The court said that "[i]t is not entirely clear from the court's opinion whether [its findings] include Roach's ability to control her conduct at the time of her offense.... It if does not, the departure was, as we just explained, an incorrect application of § 5K2.13. But to the extent the judge's conclusion can be read to include a finding that Roach had a significantly impaired capacity to control her conduct at the time of the

offense, it is unsupported by the evidence and clearly erroneous." *Id.*

On remand, Roach sought and obtained leave to renew her motion and to supplement it with further evidence to attempt to fill the gap identified by the Seventh Circuit. The government has consistently argued that Roach is not entitled to add new evidence to the record and that her downward departure motion is a closed issue. On two prior occasions, the Court has disagreed. The government now seeks reconsideration, relying on a recently-decided Seventh Circuit decision which in turn discusses a 1998 decision that the government had not previously cited. This time the government has the better of the argument.

In initially opposing Roach's request to renew her motion for downward departure, the government relied exclusively on the "law of the case" doctrine, saying that the departure issue had already been decided by the Seventh Circuit. In reply, Roach relied on several Seventh Circuit decisions which indicated that after a sentence is vacated, a "clean slate" exists (though the defendant cannot raise new grounds for departure not previously argued). *See United States v. Polland,* 56 F.3d 776, 778-79 (7th Cir.1995); *United States v. Atkinson,* 979 F.2d 1219, 1223 (7th Cir.1992); *United States v. Barnes,* 948 F.2d 325, 330 (7th Cir.1991). In one of these cases, *Polland,* the Seventh Circuit had quoted with approval an Eighth Circuit decision to the effect that when a sentence is vacated and a case is remanded for resentencing, "'the district court can hear any relevant evidence on *that issue* that it could have heard at the first hearing." *Polland,* 56 F.3d at 779 (quoting *United States v. Cornelius,* 968 F.2d 703, 705 (8th Cir.1992)) (emphasis original in *Polland*). On

the strength of these decisions, the Court granted Roach leave to renew her downward departure motion.

After Roach filed her renewed motion, the government filed a response in which it argued that *Polland, Atkinson,* and *Barnes* were no longer good law. It relied on two Seventh Circuit decisions that, the government argued, "disavowed the notion that a general remand gives the district court a 'clean slate' in the resentencing process." Govt. Resp. to Dfdt's Mot. for Downward Departure, p. 3 (citing *United States v. Parker,* 101 F.3d 527, 528 (7th Cir.1996) and *United States v. Husband,* 317 F.3d 247, 250-51 (7th Cir.2002)). The Court agreed with Roach's position that these cases did not affect the continuing validity of *Polland* as applied to this case.

Parker involved a defendant who, in a previous appeal, had obtained an order vacating his sentence on the grounds that he should not have received an enhancement for obstruction of justice, and remanding for resentencing. After resentencing, he again appealed, and his appellate counsel filed an *Anders* brief. In response, the defendant raised a number of additional challenges to his sentence. The Seventh Circuit rejected these arguments, stating that "[t]he remand was limited to the enhancement for the obstruction of justice. Only an issue arising out of the correction of the sentence ordered by this court could be raised in a subsequent appeal. Any issue not arising out of that correction could have been raised in the original appeal and was therefore waived by not being raised then." *Id.* at 528 (citing *Polland,* 56 F.3d at 779 and *United States v. Soto,* 48 F.3d 1415, 1419 n. 10 (7th Cir.1995)). The court went on to note that language in some previous cases (here the court cited *Atkinson* and *Barnes,* but not *Polland*) "might be read to say that a remand limits the

issues open to consideration on remand only if the opinion or order directing it so states." It stated that this was an incorrect interpretation of those cases: "As made clear in *United States v. Polland,* supra, the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error. A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it." *Id.*

In *Husband,* the defendant had appealed his conviction, arguing only that his Fourth Amendment rights had been violated by the manner in which a search had been conducted. In that first appeal, the Seventh Circuit was unable to determine from the record whether the search was reasonable, and accordingly it remanded for further proceedings. *United States v. Husband,* 226 F.3d 626, 636 (7th Cir.2000). On remand, the defendant, in addition to challenging the method of the search, also challenged his stop and arrest and the validity of a search warrant. On appeal, the Seventh Circuit held that those matter were not open on remand. It stated that "[t]he question of whether an issue was waived on the first appeal is an integral and included element in determining the 'scope of remand.'" *United States v. Husband,* 312 F.3d 247, 250 (7th Cir.2002). It went on to state that there are two major limitations on the scope of a remand. First, any issue that could have been raised on appeal, but was not, is waived and thus is not remanded. And second, "any issue conclusively decided by this court on the first appeal is not remanded." *Id.* at 250-51. To determine whether an issue

falls within the second limitation, the court stated, "the opinion needs to be looked at as a whole. The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly. For example, '[i]f the opinion identifies a discrete, particular error that can be corrected on remand without the need for redetermination of other issues, the district court is limited to correcting that error.'" *Id.* at 251 (quoting *Parker,* 101 F.3d at 528; other citations omitted). In Husband's case, the new issues were outside the scope of the remand because they had not been raised in the first appeal. *Id.*

This Court held that neither *Parker* nor *Husband* precluded consideration of Roach's renewed motion. First, *Parker* specifically reaffirmed *Polland,* on which the Court had primarily relied in granting Roach leave to file the motion. Second and just as importantly, both *Parker* and *Husband* involved attempts to raise on remand issues that the defendant had not appealed or which he had never raised prior to the first appeal. The same is not true of Roach's renewed motion; it raises the identical issue addressed in her original motion for downward departure, seeking only to supplement the record to attempt to cure the deficiency that led to the reversal. Neither *Parker* nor *Husband* contained any language indicating that a defendant whose sentence was vacated and remanded was precluded from adducing on remand additional evidence on the particular issue that was raised and addressed on appeal. The Court therefore set Roach's motion for an evidentiary hearing.

The government now seeks reconsideration, relying on *United States v. Sumner,* 325 F.3d 884, 2003 WL 1813835 (7th Cir.2003) ("*Sumner II*") and that case's discussion of

United States v. Wyss, 147 F.3d 631 (7th Cir.1998). Sumner's sentence was vacated on his first appeal "because the district court had not made adequate factual findings linking his uncharged trafficking of a substantial amount of crack cocaine to the offense of conviction." *Id.,* 2003 WL 1813835 at (citing *United States v. Sumner,* 265 F.3d 532 (7th Cir.2001) ("*Sumner I*")). Though Sumner had not raised this issue in the district court, the Seventh Circuit found plain error. *Sumner I,* 265 F.3d at 539-40. On remand, the district court heard additional evidence and again ruled in the government's favor. *Id.* Sumner again appealed, arguing that the court should not have allowed new evidence at the remanded sentencing hearing. He relied (as the government now does in the present case) on *United States v. Wyss,* 147 F.3d 631 (7th Cir.1998). In *Wyss,* the defendant was convicted of marijuana distribution, but his sentence was enhanced based on alleged relevant conduct involving his possession of cocaine. On appeal, the Seventh Circuit held that cocaine that the defendant had possessed for personal consumption could not be included in the relevant conduct analysis. It remanded for resentencing, but "because Wyss had specifically objected to inclusion of the personal-use cocaine in the relevant conduct determination and the government had offered no contrary evidence, [the court] held that the personal-use percentage question was now closed: '[t]he government was entitled to only one opportunity to present evidence on the issue.'" *Sumner II,* 2003 WL 1813835, at (discussing *Wyss*).

In *Sumner II,* the defendant argued that *Wyss* "stands for the broad proposition that the government may never offer new evidence on a sentencing remand. He sees no difference between an issue that was fully explored at the

initial sentencing hearing and one that received no attention, but was nevertheless reviewed on appeal under the plain error standard." *Id.* The court rejected this argument, stating that "[s]uch a rule would require the government to anticipate and present evidence on every conceivable issue that might later be found to constitute plain error on appeal. This would impose an impossible burden on the government. Furthermore, it would actually give the defendant a benefit from plain error review of a forfeited issue, instead of merely relieving him or her from the consequences of failure to preserve the issue." *Id.* at 888-89. The court therefore held that "the *Wyss* rule does not preclude the government, on a sentencing remand, to introduce evidence relevant to points that the defendant forfeited but that were considered on plain error review by this court." *Id.* at 889.

Roach's case, of course, does not involve a matter that was reviewed on appeal via the plain error rule. Rather, *Sumner II's* significance involves on its reference to the "*Wyss* rule." The government construes Wyss, *and* Sumner II's *reference to it, as establishing a general ban on the introduction of new evidence on remand of a sentencing where the trial court's finding on the issue in question was reversed, after plenary review, based on insufficiency of the evidence. In this regard,* Wyss *stands in stark contrast with* Polland, *which is not referenced in* Wyss, *was decided just three years earlier (in 1995), and was seemingly reaffirmed in* Parker *in 1996.*

The question, in this Court's view, is a close one.[1] But after careful consideration, the Court agrees with the government; *Wyss* has effectively overruled *Polland*.[2] The "*Wyss* rule," as we see it, is that if a sentencing factor or departure motion is fully litigated in the district court, and the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling, then the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances justifying such an opportunity. The "special circumstances" exception, though not mentioned in *Wyss,* comes from *United States v. Leonzo,* 50 F.3d 1086, 1088 (D.C.Cir.1995), which the Seventh Circuit cited in *Wyss* as supporting its "one opportunity" rule. *See also United States v. Buckley,* 251 F.3d 688, 669-70 (7th Cir.2001). We need not address the specific contours of the exception here, as Roach has offered no reason why the *Wyss* rule should be relaxed in her case.

Roach argues that *Wyss* does not apply to this case at all, because the Seventh Circuit reversed our decision not because our findings were unsupported by the evidence, but because the findings were unclear. Were that so, Roach might be entitled to introduce new evidence on remand; that is essentially what occurred in *Sumner* after the

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[1] In this regard, this Court fully wholeheartedly agrees with Chief Judge Flaum's comment in *Husband* that the matter of what is and is not open on remand is an area fraught with confusion. *Husband,* 312 F.3d at 250.

[2] Though the court in *Wyss,* unlike in this case, had imposed in the first appeal a specific limitation on the scope of remand, *Parker* teaches that the existence or non-existence of such a limitation does not determine the scope of the remand. Rather, the scope of the remand is determined based on the overall context of the Court of Appeals' ruling.

Seventh Circuit reversed due to the inadequacy of the trial court's findings. But Roach has misinterpreted the Seventh Circuit's decision in her case. The Court of Appeals, though first indicating that it was unclear whether this Court had made a sufficient finding on the issue of Roach's condition at the time of the offense, went on to say that if we had made such a finding, it was unsupported by the evidence. The latter holding is sufficient to bring the *Wyss* rule into play. Roach is not entitled on remand to attempt to plug the gap that the Court of Appeals found in the original record. Her motion for downward departure is therefore denied.

The Court closes by saying that though we believe we have correctly interpreted the pertinent Seventh Circuit decisions, the matter is not free from doubt. And if we have correctly read *Wyss,* it conflicts with the law in several other Circuits. *See, e.g., United States v. Rodgers,* 278 F.3d 599, 602 (6th Cir.2002); *United States v. Behler,* 100 F.3d 632, 635 (8th Cir.1996) (citing *Cornelius,* 968 F.2d at 705). We are hopeful that further clarification will be forthcoming if and when an appeal is taken in the present case.

Conclusion

For the foregoing reasons, the Court grants the government's motion for reconsideration and denies defendant's renewed motion for downward departure. The case remains set for sentencing on June 6, 2003 at 1:30 p.m.

APPENDIX D

296 F.3d 565

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Elizabeth R. **ROACH**, Defendant-Appellee.

No. 01-2618.

Argued Dec. 3, 2001.
Decided July 10, 2002.

David E. Bindi (argued), Office of the United States Attorney Criminal Division, Chicago, IL, for plaintiff-appellant.

Jeffery B. Steinback (argued), Chicago, IL, for defendant-appellee.

Before POSNER, EVANS, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

Elizabeth Roach embezzled more than $240,000 from her employer over a three-year period. She did this in order to repay significant debt incurred by her excessive purchases of jewelry and clothes, and to conceal that debt from her husband. Roach pleaded guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. At sentencing, the district court granted her motion under U.S.S.G. § 5K2.13 for a downward departure from the applicable sentencing range, finding that she committed the offense while suffering from a significantly reduced mental capacity. We conclude that the district court abused its discretion

in granting the departure, and therefore vacate the sentence and remand the case for resentencing.

I. BACKGROUND

Roach suffers from chronic depression and for most of her adult life has turned to unnecessary and excessive shopping to relieve the pain of that depression. For years, she has undergone psychiatric therapy for this behavior – which her doctors describe as compulsive shopping – and for depression. Roach's shopping binges caused a severe strain on her marriage, and she consistently engaged in behavior to hide her binges from her husband, such as having credit card statements sent to friends' homes or manipulating the entries in their checkbook. If her husband tried to prevent her from using their credit cards, she obtained new ones. Although she and her husband had a combined annual income of more than $300,000 (and considerable equity in a condominium in one of Chicago's most fashionable neighborhoods), Roach carried tens of thousands of dollars in credit card debt resulting from purchases of jewelry and clothes at upscale stores like Neiman Marcus and Barneys New York. On one occasion she applied for and obtained a store credit card and charged $10,000 that same day. Roach said that she was terrified that her husband would leave her if he discovered the extent of her shopping and shopping-related debts.

The fraud began soon after Roach was hired by Andersen Consulting as an experienced manager and later as an associate partner earning an annual salary of $150,000. It started innocently enough, when Roach submitted to Andersen an expense report seeking reimbursement for conference registration fees that she had paid using her

personal charge card. When she was later unable to attend the conference, the fees were refunded, but by then, Andersen had already processed her expense request and reimbursed her for the fees. Although she knew she should return the money, she realized that keeping the money provided an opportunity to pay some of her debt and hide the debt from her husband. After that incident, and continuing for three years until she was fired, Roach submitted expense reports that contained hundreds of incidents of falsified expenses totaling more than $240,000. The district court summarized these incidents as follows:

> The falsifications took several different forms. She padded her expenses in approximately 160 instances, obtaining just over $19,000 to which she was not entitled. On 102 occasions, she submitted expense reports for reimbursement of air fares that had actually been billed directly to Andersen, and in this way she obtained around $89,000. On twenty-five occasions, Ms. Roach requested reimbursement for conferences that she had registered for but had not attended, for a total of over $115,000. On thirteen occasions, she submitted expense reports for expenses that Andersen had already reimbursed, for a total just short of $16,000. And on three occasions, Ms. Roach sought and obtained reimbursement for personal expenses which she falsely labeled as business expenses, totaling just over $1,200. It does not appear to the Court that each of these 323 incidents of false reporting represents a separate expense report; though it is not entirely clear, it appears that they represent false line items on a somewhat smaller number of reports, though the exact amount is not clear to the Court. The total amount that she obtained from

> Andersen by fraud over the three years from April 1996 through April 1999 is $241,061.

Roach pleaded guilty to knowingly executing a scheme to defraud Andersen by use of a wire transmission in interstate commerce (at least one of the false reports was sent by email from Philadelphia to Chicago) in violation of 18 U.S.C. § 1343. For purposes of sentencing, the United States Sentencing Commission Guidelines assign a base offense level of 6 to that crime. U.S.S.G. § 2F1.1. This base level was increased by 8 because her fraud involved more than $200,000, *see* U.S.S.G. § 2F1.1(b)(1)(I), and further increased by 2 levels because her offense involved more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2), resulting in an adjusted offense level of 16. The government agreed that the offense level should be reduced to 13 based on Roach's acceptance of responsibility. *See* U.S.S.G. § 3E1.1. With a criminal history category of I,[1] the prescribed sentencing range at level 13 is 12-18 months' imprisonment. U.S.S.G. § 5A. At that range, the minimum sentence must be satisfied by imprisonment, without the use of alternatives such as community confinement or home detention. *See* U.S.S.G. § 5C1.1(f) & cmt. n. 8.

Roach moved for a downward departure from the guidelines range based on diminished capacity, pursuant to U.S.S.G. § 5K2.13. The district court granted her motion, finding that her offense was motivated and caused by her compulsive shopping and depression and that she had a significantly impaired ability to control her behavior. The court sentenced Roach to five years' probation, and

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[1] Her only prior conviction was one state shoplifting charge, which occurred a few months before she was fired by Andersen. She pleaded guilty and was sentenced to 2 years' probation.

imposed, as special conditions of probation, six weeks' work release at the Salvation Army Center, six months' home confinement with weekend electronic monitoring, and a prohibition against Roach's obtaining any new credit cards without the court's permission. The court also ordered restitution in the amount of $241,061.08[2] and imposed a $30,000 fine and mandatory special assessment of $100. The government appeals the sentence pursuant to 18 U.S.C. § 3742(b)(3).

II. ANALYSIS

We review the district court's decision to impose a sentence lower than the guideline range for abuse of discretion, which "includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). We review for clear error a sentencing court's resolution of factual questions related to its decision to depart, *United States v. Crucean,* 241 F.3d 895, 899 (7th Cir.2001), and will reverse based on clear error only if "we are left with a 'definite and firm conviction that a mistake has been committed.'" *United States v. Huerta,* 239 F.3d 865, 875 (7th Cir.2001) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

Emotional and mental disorders are ordinarily not a basis for departing from the prescribed sentence. *See* U.S.S.G. § 5H1.3 (policy statement); *United States v. Pullen,* 89 F.3d 368, 370 (7th Cir.1996). A departure may

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[2] The restitution has since been paid in full.

be warranted, however, if the defendant suffers from a "significantly reduced mental capacity":

> A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. . . . If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

U.S.S.G. § 5K2.13 (policy statement).[3] In its application note to § 5K2.13, the Commission defines "significantly reduced mental capacity," as including both cognitive and volitional impairments:

> "Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

U.S.S.G. § 5K2.13, cmt. n. 1. We have interpreted § 5K2.13 as requiring that the impairment be both (1) sufficiently serious and (2) connected to the offense. *United States v. Frazier,* 979 F.2d 1227, 1230 (7th Cir.1992); *United States v. Gentry,* 925 F.2d 186, 189 (7th Cir.1991).

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[3] The portion of § 5K2.13 omitted here prohibits a departure under circumstances that the government agrees are not relevant to this case: if (1) the impairment was caused by the defendant's voluntary use of drugs or other intoxicants; (2) the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. U.S.S.G. § 5K2.13.

A. Connection to the Offense

On appeal, the government does not seriously dispute the district court's finding that Roach had a significantly impaired ability to control her shopping, or that either her depression or compulsive shopping disorder motivated her crime. Instead, the government argues that the district court erred in holding that an impairment that provides the motive is a sufficient "connection" to the offense under § 5K2.13. In the government's view, for volitional impairments, the compulsive behavior must be the behavior constituting the offense, and not some other behavior that explains the motive. We agree with the government that § 5K2.13 requires more than a connection between the impairment and the motive because motive does not address the critical question – what was the defendant's mental capacity when she committed the offense?

We begin with the Eleventh Circuit's opinion in *United States v. Miller,* 146 F.3d 1281, 1286 (11th Cir.1998), which supports our view that an impairment that provides a motive is insufficient under § 5K2.13. In *Miller,* the defendant claimed his compulsion for viewing adult pornography caused him to trade in child pornography (the offense for which he was convicted) because his trade in child pornography facilitated his acquisition of adult pornography. The Eleventh Circuit held that the defendant's offense of possession of child pornography was no more related to his compulsion to view adult pornography "than if he had robbed someone in order to use the proceeds to purchase adult pornography." *Id.* The court explained:

> The impulse was related to viewing pornography, but was not related to the means of obtaining the pornography. A departure under § 5K2.13 requires that the reduced mental capacity contribute

> to the offense. The experts' testimony merely showed that the impulse control disorder explained his interest in adult pornography, but it failed to establish that the disorder caused him to trade child pornography, which is the offense for which he was being sentenced.

Id. Rejecting the district court's finding that the defendant had a significantly impaired ability to refrain from the offense conduct, the court held that the departure for diminished capacity was improper and vacated the sentence. *Id.*

In response, Roach relies on *United States v. Sadolsky,* 234 F.3d 938 (6th Cir.2000), in which the Sixth Circuit rejected the argument that, under § 5K2.13, the compulsive behavior must be the behavior constituting the offense. In *Sadolsky,* the defendant, a compulsive gambler, defrauded his employer over a six-month period by crediting returned merchandise to his personal credit card. The district court granted a departure for diminished capacity, based on the defendant's claim that he committed the fraud in order to pay off his gambling debts. On appeal, the government argued that a departure under § 5K2.13 was not available because the offense at issue was fraud, and not illegal gambling. The Sixth Circuit disagreed, holding that § 5K2.13 does not require a "direct link" between the defendant's impairment and the crime, noting that the guideline does not distinguish between impairments "that explain the behavior that constituted the crime" and impairments "that explain the behavior that motivated the crime." 234 F.3d at 943. The court reasoned that the distinction urged by the government could lead to "arbitrary" results in cases in which the impairment was

the "driving force" behind the crime but the connection with the offense was not "direct":

> For example, under the Government's theory, if someone with an eating disorder stole food, he or she would be entitled to a downward departure under § 5K2.13. If, however, that same person stole money to buy food, he or she would not be entitled to a downward departure. In the latter situation, the link between the crime, stealing money to buy food, and the [impairment], an eating disorder, is no longer technically direct. Nonetheless, no one can dispute that the eating disorder is the driving force behind the crime. Yet under the Government's theory, the two individuals would be treated differently based on a nebulous distinction between a volitional impairment that causes the conduct that constitutes the crime and a volitional impairment that explains the motive for the ultimate crime.

Id.

We agree with the Sixth Circuit that the distinction between "direct" and "indirect" causes does not determine whether § 5K2.13 applies. The distinction drawn in the hypothetical posed in *Sadolsky* is a bit of a straw man, however. In neither example is the connection between the impairment and the offense strictly "direct"; one with an eating disorder presumably has a compulsion to eat, not to steal. In other words, even in the example of the defendant who stole food rather than money (a connection that *Sadolsky* labels "direct"), we still don't know how his eating disorder was connected to the offense. For example, did he have money to buy the food but stole it anyway? Classifying the connection between the impairment and the offense as direct or indirect does not tell us anything

about the strength of that connection or indeed whether the impairment has any relevance in determining the appropriate sentence.

Likewise, understanding the defendant's motive does not necessarily reveal anything about the defendant's mental capacity at the time of the offense, which is the proper focus of the inquiry for purposes of § 5K2.13. *See Frazier,* 979 F.2d 1227, 1230 n. 2 ("Section 5K2.13 focuses the inquiry on the defendant's mental capacity *when she committed the offense.*") (emphasis in original); *United States v. Greenfield,* 244 F.3d 158, 162 (D.C.Cir.2001) ("defendant's mental capacity must have been significantly reduced *at the time he committed the offense.*") (emphasis in original). Although the definition of significantly reduced mental capacity does not expressly link volitional impairments to the offense conduct, referring instead to the ability "to control behavior that the defendant knows is wrongful," § 5K2.13 supplies that link by specifying that a departure may be considered if the "defendant committed the offense *while suffering* from a significantly reduced mental capacity." U.S.S.G. § 5K2.13 (emphasis added); *see Frazier,* 979 F.2d at 1230 (holding that the district court incorrectly applied § 5K2.13 by granting a departure without a finding about the defendant's mental capacity at the time of the offense); *Miller,* 146 F.3d at 1285 ("§ 5K2.13 requires that the diminished capacity be linked to the commission of the offense."). In this case, the behavior at issue at the time of Roach's offense is her submission of false expense reports, not her shopping.

Similarly, the district court's finding that Roach would not have committed the offense had it not been for her shopping disorder, without more, cannot support the departure. As we explained in *United States v. Dyer,* 216

F.3d 568 (7th Cir.2000), but-for causation is a very weak sense of causation:

> But for [defendant's] having been born, he wouldn't have operated a Ponzi scheme; but it would be odd, in fact incorrect, to say that his birth (or the birth of his parents or grandparents) caused his crime.

216 F.3d at 570. Roach's compulsive shopping may well have been a necessary cause of her offense and even, in the district court's words, the "driving force" behind it. But like motive, this finding reveals nothing about Roach's mental capacity when she committed the fraud, and therefore does not establish diminished capacity for purposes of § 5K2.13.

This is not to say, as suggested by the government's argument, that a shopping compulsion could only be relevant to sentencing for shoplifting, for example, or a gambling compulsion only to sentencing for illegal gambling. There may well be circumstances when such a disorder not only provides the motive for the offense, but also significantly impairs the defendant's ability to control the conduct with which she is charged, such as if the defendant's impairment had manifested itself in episodes of significantly reduced judgment or control at the time of her shopping sprees and also when she committed the fraud.[4] In sum, section 5K2.13 requires an assessment of

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[4] *Sadolsky* implies that a departure may be warranted if, because of financial circumstances, the offense was necessary in order to satisfy the compulsion. *See* 234 F.3d at 943 (noting that the defendant had "maxed out" his credit line before resorting to fraud). Roach does not make any such argument, so we need not address this question, or address the government's argument that a departure under those circumstances would be barred by U.S.S.G. § 5K2.12, which states that

(Continued on following page)

the defendant's mental capacity at the time of the offense. It is in making this assessment that the district court's analysis and findings fall short.

B. Evidence of Roach's Mental Capacity

In concluding that the departure was warranted, the district court found, "[i]n the words of Guidelines § 5K2.13 and its application notes," that "Roach committed the offense while suffering from a significantly reduced mental capacity, in that she had a significantly impaired ability to control behavior that she knew was wrongful." It is not entirely clear from the court's opinion whether this finding includes Roach's ability to control her conduct at the time of her offense – that is, her submission of fraudulent expense reports. If it does not, the departure was, as we just explained, an incorrect application of § 5K2.13. But to the extent the judge's conclusion can be read to include a finding that Roach had a significantly impaired capacity to control her conduct at the time of the offense, it is unsupported by the evidence and clearly erroneous.

The district court had before it statements from doctors who examined Roach, as well as evidence about Roach's history relating to her compulsive shopping binges and the activities surrounding those binges. The district court found that Roach was "not able fully to control the things she did in order to allow her to continue to carry out [her shopping] compulsion," pointing to evidence that she had consistently engaged in activities to "facilitate and conceal" her shopping, such as paying for groceries with

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"personal financial difficulties and economic pressure upon a trade or business do not warrant a decrease in sentence."

checks written for amounts above the purchase amount, obtaining new credit cards, having bills sent to friends' houses, and borrowing money from relatives to pay her credit card debt. While this evidence might perhaps indicate a lack of control with respect to those (lawful) activities, it does not shed light on her mental capacity at the time she engaged in the fraudulent conduct.

The doctors' statements are similarly inadequate to support a finding that Roach had a significantly impaired ability to control her conduct at the time of her offense. Dr. Jeffrey Roth, a psychiatrist who treated Roach, did not offer an opinion on that subject, but stated that "it is a consistent diagnostic criterion that these individuals [who suffer from compulsive shopping disorders] can desperately commit illegal acts such as forgery or theft to finance their illness and hide their debt from family and others." Notably missing from Dr. Roth's statement is any conclusion that this aspect of the disorder even applies to Roach or, if it did, any assessment of the role it played at the time of her offense. *Cf. Greenfield,* 244 F.3d at 163 (expert's testimony that "if a depression is severe enough, . . . it could significantly reduce someone's mental capacity" could not support a departure under § 5K2.13).

Unlike Dr. Roth, Dr. Robert Galatzer-Levy, who evaluated Roach at the request of the defense, did conclude that Roach had a significantly reduced mental capacity both during her shopping binges and when she submitted the false expense reports:

> During both the compulsive shopping and the commission of the charged offense Mrs. Roach appears to have been functioning in a dissociated state in which information about the legal, practical and moral consequences of her actions was

> not effectively available to her. This constitutes a significant reduction in her mental capacity at the time of commission of the charged offense.

With respect to his conclusion about Roach's mental state while shopping, Dr. Galatzer-Levy explained his reasoning, which the district court summarized as follows:

> [C]ompulsive shopping is one of several ways that persons suffering from severe depression attempt to relieve the effects of their depression. Other such "self-medicating" activity of this type can include alcohol consumption, compulsive eating, gambling, or sexual activity. Some researchers believe that this type of behavior temporarily increases the person's available level of serotonin, a neurotransmitter that, among other things, determines the extent and severity of depression, and thus provides temporary relief from the person's symptoms. During this activity, the person is in a dissociative state in which information that ordinarily would influence the person's behavior does not do so. In short, the types of concerns that would prevent most people from engaging in such activity, such as recognition of the financial implications, disapproval of family members, or simple common sense, are simply not at work.[5]

By contrast, Dr. Galatzer-Levy offers no explanation of the reasoning behind his conclusion that Roach had a significantly impaired ability to control her behavior at the time of her offense. His statement fails to reconcile its apparent inconsistency with Roach's own statements that

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[5] Dr. Arnold Goldberg offered a similar opinion about Roach's mental state during her shopping binges.

she began the fraud after inadvertently discovering that she could be paid by her employer for expenses relating to conferences she had cancelled. According to Roach, she kept the money after realizing that it was a way to pay off her debt and conceal it from her husband. Given these statements, the episodic nature of her impairment, and the fact that Roach had "self-medicated" her depression and compulsively shopped for more than ten years without any criminal activity, the analytic leap from a shopping compulsion to a significantly impaired ability to control fraudulent conduct spanning three years is too great to make without supporting reasons or evidence. Dr. Galatzer-Levy's naked conclusion about Roach's mental state at the time of the offense is therefore entitled to little, if any, weight. *See Mid-State Fertilizer Co. v. Exch. Nat'l Bank,* 877 F.2d 1333, 1339 (7th Cir.1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

Dr. Paul Pasulka's report, prepared at the request of the government, is similarly unhelpful. Dr. Pasulka concludes that Roach was not fully able to control unspecified wrongful behavior, but does not say that her impairment was significant. Like Dr. Galatzer-Levy, Pasulka supplies little in the way of evidence or reasoning supporting his conclusion, and his only observation about Roach's offense conduct – that she defrauded her employer in an attempt to hide her behaviors – tends to undermine, rather than support, a finding that Roach had a significantly impaired capacity to control her conduct at the time of the offense.

III. CONCLUSION

We have no doubt that Roach's depression and shopping have had a profound impact on her life. In this way she is like countless criminal defendants who come before the court from all walks of life with a wide variety of personal characteristics that suggest a basis for leniency. The sentencing guidelines, however, significantly limit a district court's ability to fashion | a sentence based on such considerations. Those guidelines prescribe a particular sentencing range, which in this case was driven by the magnitude of Roach's fraud. We are mindful that our review of the district court's decision to impose a sentence below this range is deferential, but are convinced that the court abused its discretion in granting a downward departure based on § 5K2.13. Its findings on Roach's motive do not establish the critical issue of her mental capacity at the time of the offense, and on that issue, there is no evidence to support the court's conclusion that Roach had a significantly impaired ability to control her behavior. Roach's sentence is therefore VACATED and the case REMANDED for resentencing.

(2)

Supreme Court, U.S.
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No. 04-414

In the Supreme Court of the United States

ELIZABETH R. ROACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Fifth or Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. Whether, when a court of appeals concludes that a party failed to meet its burden of proving its entitlement to an adjustment or departure under the Sentencing Guidelines, the party may present supplemental evidence after the case has been remanded for resentencing.

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In the Supreme Court of the United States

No. 04-414

ELIZABETH R. ROACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 372 F.3d 907.[1] The opinion of the district court (Pet. App. C1-C9) is not published in the *Federal Supplement*, but is *available at* 2003 WL 21183997. An earlier opinion of the court of appeals (Pet. App. D1-D16) is reported at 296 F.3d 565.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. The petition for a writ of certiorari was filed on September 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition includes the opinion of the court of appeals (Pet. App. A1-A6) but omits a portion of it (compare *id.* at A2 with 372 F.3d at 908).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343. The district court sentenced her to five years of probation and a fine of $30,000, and ordered her to pay $241,061.08 in restitution. The court of appeals reversed. On remand, the district court sentenced petitioner to a year and a day of imprisonment, to be followed by two years of supervised release, and a fine of $10,000, and again ordered her to pay $241,061.08 in restitution. The court of appeals affirmed. App., *infra*, 1a-7a.

1. Petitioner suffered from chronic depression. For most of her adult life, she coped with the ailment by engaging in unnecessary, excessive, and compulsive shopping. Her shopping binges put a severe strain on her marriage, and she tried to hide her behavior from her husband by having credit-card statements sent to the homes of friends and manipulating entries in the couple's checkbook. When her husband tried to prevent her from using their credit cards, she got new ones. Although the couple had a combined annual income of more than $300,000, as well as significant equity in a condominium in Chicago, petitioner carried tens of thousands of dollars in credit-card debt from purchases of clothing and jewelry at stores like Neiman Marcus and Barneys New York. Petitioner once charged $10,000 on a credit card on the same day she obtained it. Pet. App. D2.

Petitioner's criminal conduct began soon after she was hired by Andersen Consulting (Andersen) as a manager. (She later became an associate partner with an annual salary of $150,000.) After paying the regis-

tration fees for a conference with a personal credit card, petitioner decided that she could not attend the conference, and the registration fees were refunded. By then, however, Andersen had processed her expense request and reimbursed her for the fees. Petitioner was aware that she should return the money to her employer, but she kept it, realizing that she could use it to pay some of her debt. After that incident, and for three years until she was fired, petitioner fraudulently obtained more than $240,000 from Andersen by submitting reports with hundreds of falsified expenses. Pet. App. D2-D3.

2. Petitioner pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. 1343. After increases in her offense level based on the amount of the loss and the fact that the offense involved more than minimal planning, petitioner's total offense level was 13 and her Sentencing Guidelines range was 12 to 18 months of imprisonment. Contending that she suffered from diminished capacity, petitioner moved for a downward departure under Sentencing Guidelines § 5K2.13. The district court granted the motion, finding that petitioner's offense was caused by her compulsive shopping and depression and that she had a significantly impaired ability to control her behavior. The court sentenced petitioner to five years of probation, including six weeks of work release and six months of home confinement. Pet. App. D4-D5.

3. The government appealed, and the court of appeals vacated the sentence and remanded for resentencing. Pet. App. D1-D16. The court held that a departure on the basis of diminished capacity must rest on an assessment of the defendant's mental capacity at the time of the offense, which in this case was the time at which petitioner submitted the false expense reports.

Id. at D10-D12. The court concluded that, if the district court's departure was not based on such an assessment, it constituted an incorrect application of the Guidelines. *Id.* at D12. The court of appeals also concluded that, if the departure *was* based on such an assessment, it was unsupported by the evidence. *Id.* at D12-D15. In either event, the court held, the departure was an abuse of discretion. *Id.* at D16.

4. On remand, petitioner sought leave to file a renewed motion for a downward departure and offered to introduce additional information about her inability to control her conduct at the time she submitted the false expense reports. Pet. App. C2. Over the government's objection, the district court allowed petitioner to renew her motion. *Ibid.* The government then moved for reconsideration. *Id.* at C5-C6. It relied (see *ibid.*) on the Seventh Circuit's then-recent decision in *United States* v. *Sumner*, 325 F.3d 884, cert. denied, 540 U.S. 897 (2003), which interpreted the Seventh Circuit's earlier decision in *United States* v. *Wyss*, 147 F.3d 631 (1998).

The district court granted the government's motion for reconsideration and denied petitioner's renewed motion for a downward departure. Pet. App. C1-C9. Relying on what *Sumner* called the "*Wyss* rule," *id.* at C7-C8, the district court held that, if "a sentencing factor or departure motion is fully litigated in the district court" and "the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling," then "the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances," *id.* at C8. Applying that principle, the district court concluded that the court of appeals had found the evidence supporting the downward departure insufficient and

that petitioner was not entitled on remand "to attempt to plug the gap" in the record. *Id.* at C9. The district court also concluded that petitioner had identified no "special circumstances" that justified an exception to the "*Wyss* rule." *Id.* at C8. The court subsequently sentenced petitioner to a prison term of a year and a day. App., *infra*, 4a.

5. Petitioner appealed the sentence, and the court of appeals affirmed. App., *infra*, 1a-7a.

The court rejected petitioner's contention that its remand order had established a "clean slate" that authorized a rehearing on her request for a downward departure. App., *infra*, 4a-5a. Citing its decision in *Wyss*, where it "precluded the government from presenting additional evidence on an enhancement during the resentencing hearing," the court said that the concept of a "clean slate" allows a district court to effectuate its original sentencing intent, but does not permit a court to reopen issues that have been fully heard. *Id.* at 5a (citing 147 F.3d at 633). The court of appeals went on to say, however, that "this limit is not absolute." *Ibid.* Quoting *Sumner*, the court explained that, if an issue "received no attention" at the initial sentencing hearing and was "reviewed on appeal under the plain error standard," it may be appropriate to admit additional evidence. *Ibid.* (quoting 325 F.3d at 888). The court contrasted that situation with one in which "an issue has been fully explored," and in which "the party bearing the burden of proof" is therefore "precluded from presenting additional evidence." *Ibid.* The court observed that the "*Wyss* rule" applies equally to defendants and the government, such that, "[w]hen either party fails to meet the burden to prove a guidelines' sentencing departure or enhancement, it cannot

use the opportunity of a remand to supplement the record in its favor." *Id.* at 6a.

Applying these principles, the court of appeals concluded that the issue of petitioner's mental capacity had been "fully explored" at the initial sentencing, and that she "was not entitled to a second bite at the apple on remand." App., *infra*, 5a-6a. The court noted that petitioner had submitted "three doctors' statements," and had detailed her "binge shopping history" and "the activities surrounding those binges," in support of her contention that "she was significantly impaired at the time she committed the offense" and therefore qualified for a departure. *Id.* at 6a.

DISCUSSION

1. Petitioner first contends (Pet. 10-14) that her sentence was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). In *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), and *United States* v. *Fanfan*, No. 04-105 (Jan. 12, 2005), this Court held that *Blakely* applies to the United States Sentencing Guidelines. *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), slip op. 5-20 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 2-26 (Breyer, J., for the Court). With respect to question one in the petition, therefore, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable

doctrines of waiver, forfeiture, and harmless error. See *id.* at 25-26.

2. Petitioner next contends (Pet. 15-20) that a party must be permitted to present supplemental evidence in district court after a court of appeals has remanded the case for resentencing. In rejecting that contention, the court of appeals held that, "if an issue has been fully explored" at the initial sentencing, "the party bearing the burden of proof" is "precluded from presenting additional evidence" on the issue at resentencing. App., *infra*, 5a. The court of appeals' holding is correct, and further review on that question is unwarranted.

a. Petitioner contends (Pet. 15-19) that the court of appeals' decision conflicts with other decisions of the Seventh Circuit; with decisions of other courts of appeals; with a decision of this Court; with a federal statute; and with the Constitution. Each of these contentions is without merit.

i. Petitioner is mistaken in her suggestion (Pet. 15-16) that the decision below conflicts with the Seventh Circuit's prior decisions in *United States* v. *Polland*, 56 F.3d 776 (1995), and *United States* v. *Parker*, 101 F.3d 527 (1996), because those cases addressed a different question. Unlike this case, which presents the question whether, when the court of appeals finds error with respect to a particular issue and remands for resentencing, the district court may consider new evidence on that issue, *Polland* and *Parker* addressed the question whether, when the court of appeals remands for resentencing on one issue, the district court may consider *other* issues. (Both cases hold that it may not. See *Polland*, 56 F.3d at 777-779; *Parker*, 101 F.3d at 528.) In any event, review would be unwarranted even if the decision below *were* inconsistent with *Polland* and *Parker*, because this Court does not grant certi-

orari to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ii. Petitioner is also mistaken in her contention (Pet. 16-17 & n.3) that the decision below conflicts with decisions of other courts of appeals. None of the five decisions on which petitioner relies held that, after a court of appeals finds error with respect to an issue and remands for resentencing, the party with the burden of proof has a right to offer additional evidence even when the issue was "fully explored" (App., *infra*, 5a) at the initial sentencing.

In one of the cases on which petitioner relies, *United States* v. *Behler*, 100 F.3d 632 (1996), cert. denied, 522 U.S. 855 (1997), the Eighth Circuit addressed the same question that the Seventh Circuit addressed in *Polland* and *Parker*: whether, when the remand is limited to particular issues, a party may litigate other issues at resentencing. (Like the Seventh Circuit in those cases, the Eighth Circuit answered that question no. See *id.* at 635-636.) Three other decisions cited by petitioner did not involve a party's attempt to offer new evidence at resentencing at all.[2] And while the case on which

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[2] See *United States* v. *Rodgers*, 278 F.3d 599, 601-603 (6th Cir.) (in reaching same result at resentencing, district court relied on evidence that was before court at initial sentencing), cert. denied, 535 U.S. 946 (2002); *United States* v. *Stinson*, 97 F.3d 466, 467-470 (11th Cir. 1996) (per curiam) (after district court denied upward departure at initial sentencing and court of appeals issued decision that reduced defendant's Guidelines range, district court granted upward departure at resentencing and imposed same sentence it initially imposed), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Moreno-Hernandez*, 48 F.3d 1112, 1114, 1117 (9th Cir.) (after district court imposed concurrent sentences on four counts totaling 125 months and court of appeals held that maximum sentence on count four was 60 months, district court imposed consecutive sentences totaling 120 months), cert. denied, 515 U.S. 1151 (1995).

petitioner places principal reliance, *United States* v. *Matthews*, 278 F.3d 880 (9th Cir.) (en banc), cert. denied, 535 U.S. 1120 (2002), did hold that, as a general matter, the court will remand for resentencing without any limits on the evidence the district court may receive, *id.* at 885, it also made clear that the court takes a different approach "where there was a failure of proof after a full inquiry into the factual question at issue," *id.* at 886. The court thus remanded without limits on the development of the record because, as a result of an "erroneous legal determination," the district court "did *not* fully consider the relevant factual issue" at the initial sentencing. *Id.* at 888 (emphasis added). The holding of the Ninth Circuit in *Matthews* is therefore consistent with the holding of the court below.

iii. Petitioner also suggests (Pet. 18) that the decision below conflicts with this Court's statement in *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233 (1957), that, "upon appellate reversal of a conviction[,] the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *Id.* at 243. Since this statement addresses retrial after reversal of a conviction, not resentencing after vacatur of a sentence, the decision below does not conflict with *Shotwell*. Petitioner argues that vacatur of a sentence "should [not] be treated differently" (Pet. 18), but the vacatur of a sentence for failure of proof *is* different from a reversal of a conviction for trial error. "[W]hen either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor," App., *infra*, 6a, or resentencing could go on

forever. In contrast, when retrial is required because of trial error—for example, an incorrect jury instruction—it makes sense to allow the parties to present whatever admissible evidence they have. That is not giving a party a "second bite at the apple," *ibid.*, but is simply ensuring one fair hearing of a case.

iv. Petitioner is also mistaken in her contention (Pet. 18) that the court of appeals' decision conflicts with 18 U.S.C. 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3661 is a rule of evidence, not a rule of procedure. It expresses the principle that, "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial." Sentencing Guidelines § 6A1.3, comment. (citing 18 U.S.C. 3661). See also *Booker*, slip op. 8 (Breyer, J., for the Court) (18 U.S.C. 3661 furthers "real conduct" sentencing). Section 3661 says nothing about whether a party may be barred from offering information admissible under the statute if the party had an opportunity to offer the information earlier but failed to do so. Like any other rule of evidence, Section 3661 is subject to procedural rules, including the doctrines of waiver, forfeiture, and estoppel.

v. Petitioner's final contention is that her position is supported by "due process considerations." Pet. 19. She argues that the parties "did not have [the] benefit" of the court of appeals' interpretation of Sentencing Guidelines § 5K2.13 at the initial sentencing, and that "simple fairness dictates that [she should have been] afforded an opportunity to satisfy the standard articu-

lated by the court on appeal." Pet. 19. That contention is likewise without merit.

As an initial matter, the premise of petitioner's "due process" argument—that the legal standard applied by the district court at resentencing was different from the one applied at the initial sentencing—is mistaken. In the first appeal, the court of appeals held that Section 5K2.13 "requires an assessment of the defendant's mental capacity at the time of the offense." Pet. App. D11-D12. The court said that, if the district court did *not* apply that principle at the initial sentencing, its departure was an incorrect application of the Guidelines, and that, if it did apply that principle, the departure was unsupported by the evidence. *Id.* at D12-D15. If, on remand, the district court was of the view that it had not applied the correct legal principle at the initial sentencing, the court might have appropriately received additional evidence at the resentencing. The district court itself so recognized. *Id.* at C8-C9. But the district court was not of that view. Its conclusion that "the *Wyss* rule" applied (*id.* at C9), and that petitioner was "not entitled on remand to attempt to plug the gap * * * in the original record" (*ibid.*), presupposed that the district court applied the correct legal standard at the initial sentencing but found the relevant facts on the basis of insufficient evidence. Under these circumstances, there was nothing unfair about precluding petitioner from offering additional evidence at her resentencing.

Even if the district court *had* applied a different legal standard at the initial sentencing, petitioner had ample notice that the standard was incorrect. In its decision vacating the initial sentence, the court of appeals relied (Pet. App. D10) on its conclusion in *United States* v. *Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992), that

"Section 5K2.13 focuses the inquiry on the defendant's mental capacity *when she committed the offense.*" Because *Frazier* was decided more than eight years before petitioner was initially sentenced (see Pet. App. C1), it was hardly unfair to require her to offer evidence that satisfied that standard.

b. Even if the second question in the petition otherwise warranted review by this Court, it would be premature to grant certiorari given the decisions in *Booker* and *Fanfan*. As a consequence of those decisions, the Guidelines are advisory rather than mandatory. See *Booker*, slip op. 2-26 (Breyer, J., for the Court). Federal sentences are now reviewable under that system for reasonableness. See *ibid.* It is not yet known whether the rule at issue here will continue to be applied, and if so, how. The lower courts should be given an opportunity to decide what bearing, if any, *Booker* and *Fanfan* have on the second question in the petition before this Court does so.

CONCLUSION

On the first question presented, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Booker* and *Fanfan*. On the second question presented, the petition should be denied.

Respectfully submitted.

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JANUARY 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-3078

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ELIZABETH R. ROACH, DEFENDANT-APPELLANT

Submitted: Jan. 9, 2004*
Decided: June 24, 2004

Before: POSNER, EVANS, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

In this successive appeal we consider for the second time the propriety of Elizabeth R. Roach's sentence for her conviction for wire fraud. Roach contends that our remand order vacating the district court's sentence permitted the court to consider additional evidence regarding the vacated downward departure for diminished capacity. Therefore, she reasons, the district court erred at the resentencing hearing when it did not allow expert testimony regarding her state of mind at

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* We have concluded, after an examination of the briefs and the record, that oral argument is unnecessary. The appeal is, therefore, submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

the time she committed the charged offense. We disagree. For the reasons stated below, we affirm.

I. BACKGROUND

We assume familiarity with the general facts of this case as set forth in *United States v. Roach*, 296 F.3d 565 (7th Cir. 2002) (*Roach I*). We will repeat only those facts pertinent to this appeal. Roach pled guilty to wire fraud in violation of 18 U.S.C. § 1343, for knowingly executing a scheme to defraud her employer of more than $240,000. The scheme involved padding her expenses, submitting false expense reports, requesting reimbursement for conferences that she registered for but did not attend, resubmitting expense reports that were already paid, and falsely labeling personal expenses as business expenses. She used the embezzled funds to repay credit card debts that she accrued from excessive purchases of jewelry and clothes.

In *Roach I*, the district court concluded, and we agreed, that Roach suffers from chronic depression and turned to what her doctors described as compulsive shopping to relieve that depression. Her actions caused enormous strain on her marriage as she consistently engaged in behavior to hide her shopping binges from her husband. For years, she underwent psychiatric therapy for her depression and shopping disorder.

A. The Original Sentence and First Appeal

At Roach's original sentencing hearing, the district court granted her motion for a downward departure based on diminished capacity pursuant to U.S.S.G. § 5K2.13.[1] As explained in detail in *Roach I*, absent the

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[1] Section 5K2.13 provides in pertinent part: "A sentence below the applicable guideline range may be warranted if (1) the defen-

downward departure, Roach would have been required to serve a minimum of 12 months in prison. *See Roach I*, 296 F.3d at 567. The court sentenced Roach to five years of probation, six weeks of work release at the Salvation Army Center, six weeks of home confinement with weekend electronic monitoring, and prohibited her from obtaining credit cards without the court's prior permission.

On appeal in *Roach I*, 296 F.3d at 571, we held that the record lacked sufficient evidence to conclude that Roach suffered from a significantly impaired mental capacity when she committed the offense. Accordingly, we found that the district court abused its discretion in granting the downward departure and we remanded her case for resentencing consistent with our ruling. *Id.* at 573.

B. The Resentencing

The district court, over the government's objections, granted Roach's motion for leave to file a renewed motion for downward departure. Roach intended to use expert witnesses to prove that her mental capacity was significantly impaired at the time she committed the offense. Prior to the admission of any evidence, the government filed a motion to reconsider based on supplemental authority, in light of *United States v. Sumner*, 325 F.3d 884 (7th Cir. 2003). In granting the government's motion, Judge Kennelly opined that under *Sumner:*

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dant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."

> if a sentencing factor or departure motion is fully litigated in the district court, and the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling, then the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances justifying such an opportunity.

Mem. Op. & Order at 7. After granting the government's motion, the district court sentenced Roach, without the downward departure, to 12 months and one day of imprisonment. Roach appeals, arguing that the district court should have allowed her to supplement the record with additional evidence regarding her mental capacity.

II. DISCUSSION

Roach's contention that the district court erred in not fully revisiting the issue of her mental capacity at the time she committed her offense is a question of law that we review de novo. *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002).

Roach's insistence that our remand order subjected her resentencing to a "clean slate," and, therefore, a rehearing on her request for a downward departure, is incorrect. The "clean slate" analogy, like the parallel "unbundling of the sentencing package" analogy, refers to a district court's ability to restructure sentences after part or all of the sentence is severed or vacated. *See United States v. Polland*, 56 F.3d 776, 778-79 (7th Cir. 1995) (vacating a sentence results in a "clean slate" for the district court to resentence); *United States v. Noble*, 299 F.3d 907, 910 (7th Cir. 2002) (*Noble I*) ("[I]t is settled that after the appellate court vacates the

sentence on a particular count, the district court on remand may adjust the entire sentencing 'package.'"). These concepts allow a district court to effectuate its original sentencing intent, *see United States v. Binford*, 108 F.3d 723, 728-29 (7th Cir. 1997), but they do not permit the district court to reopen fully heard issues anew. We articulated this limit in *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), where we precluded the government from presenting additional evidence on an enhancement during the resentencing hearing, stating: "The government was entitled to only one opportunity to present evidence on the issue." *Id.* at 633; *see also United States v. Noble*, 367 F.3d 681, 682 (7th Cir. 2004) (*Noble III*) (holding that "the government is not permitted on remand to try again and submit new evidence in a belated effort to carry its burden."); *United States v. Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (holding that the government should not get a "second bite at the apple" after remand, as the government bore the burdens of production and persuasion). *But see United States v. Matthews*, 278 F.3d 880, 889 (9th Cir. 2002) (en banc) (holding that a district court can generally consider additional evidence for remanded sentencing guidelines issues). We clarified in *Sumner*, 325 F.3d at 888, however, that this limit is not absolute, as there is a "difference between an issue that was fully explored at the initial sentencing hearing and one that received no attention, but was nonetheless reviewed on appeal under the plain error standard." In the latter case it may be appropriate to admit additional evidence, whereas if an issue has been fully explored, the party bearing the burden of proof should be precluded from presenting additional evidence. *See id.* at 889.

Here, the district court rightly declined to allow Roach to supplement the record at her resentencing, as Roach's mental capacity was fully explored at her initial sentencing hearing. In fact, the record demonstrates both that the government objected to the application of the downward departure and that Roach presented evidence in support of her contention that she was significantly impaired at the time she committed the offense. Indeed, Roach submitted three doctors' statements, her binge shopping history, and the activities surrounding those binges in her attempt to persuade the court that she qualified for the downward departure. In *Wyss* and *Noble III*, we held that the government fully explored the sentencing enhancement issue after submitting testimony to prove drug quantity. *Wyss*, 147 F.3d at 633 (presenting defendant's testimony); *Noble III*, 367 F.3d 681, 682 (presenting government witness's testimony). And, just as in those cases, we find that Roach was not entitled to a second bite at the apple on remand.

Although this is our first application of the *Wyss* rule to defendants, Roach, correctly, does not argue that the rule should apply to the government but not to defendants. Just as the government has the burden when seeking a sentence enhancement, *United States v. Sienkowski*, 359 F.3d 463, 466 (7th Cir. 2004), Roach had the burden of establishing that she was entitled to a downward departure. *See United States v. Chavez-Chavez*, 213 F.3d 420, 422 (7th Cir. 2000) (noting that the defendant bears the burden when seeking a downward departure). When either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.